No. 8178

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ARTHUR J. EIDE, by BERTHA K. EIDE, his Guardian ad Litem,
Appellee.

Appeal From the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

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STATEMENT OF THE CASE.

This is a war risk insurance case in which the Government is appealing from a judgment rendered in the plaintiff's favor below, contending that there was no substantial evidence to support the jury's verdict finding the insured totally and permanently disabled during the life of the insurance contract, and that medical opinion testimony on the ultimate issue of total permanent disability was improperly received.

The suit was instituted by Bertha K. Eide as guardian ad litem of Arthur J. Eide on a $10,000 war risk contract which the said Arthur Eide obtained during military service and which he continued in force through the date of his discharge from the

military service, January 29, 1919, by the deduction of premiums from his military pay. For her cause of action she alleged that ever since January 29, 1919, the insured has been totally and permanently disabled by reason of "certain diseases, injuries and disabilities resulting in and known as neuro-psychiatric disease, and other disabilities as shown by the records and files of the Veterans' Administration", and that the insurance contract matured on that date (R. 2-5).

The United States filed an answer denying each and every allegation contained in the petition and issue was thus joined on the question as to whether this war risk insurance contract had matured on or before January 29, 1919, by reason of total permanent disability.

During the trial it was stipulated that the insured had entered the military service July 23, 1917, remaining therein until discharged on January 29, 1919; that he obtained war risk term insurance in the sum of $10,000, upon which sufficient premiums were paid to continue the policy in force up to and including midnight of July 1, 1919; that a claim for insurance presented to the Veterans' Administration on April 22, 1929, had been denied on June 29, 1932 (R. 47).

The case was tried in February, 1934, before the Honorable Harold Louderback, District Judge, and a jury, resulting in a jury verdict for the plaintiff finding the insured totally and permanently disabled from January 29, 1919 (R. 7-8). Judgment based thereon was entered in the cause, allowing the recovery of insurance installments in the monthly amount of $57.50 from January 29, 1919 (R. 7-9).

Before the case was submitted to the jury and at the conclusion of all the evidence, a motion for a directed verdict was made by the Government counsel and an exception was taken to the order of the court overruling the motion (R. 135). The ruling on this motion is the only error properly assigned, but during the trial several medical witnesses were permitted to express opinions as to whether they considered the insured totally and permanently disabled (R. 42, 43, 51, 52, 65, 81, 82, 89), and the admission of this testimony is urged as an additional ground for reversal.

QUESTIONS PRESENTED.

1. Whether there was any substantial evidence to show that the insured became totally permanently disabled on January 29, 1919.

2. Whether reversible error was committed in the introduction of medical opinion testimony on the ultimate issue of total permanent disability.

ASSIGNMENT OF ERRORS.
(R. 10.)

II.

The District Court erred in denying defendant's motion for a directed verdict on the ground that the evidence was insufficient to sustain the allegation of the complaint to (9) the effect that the plaintiff became totally and permanently disabled prior to the date of lapse of his insurance policy.

PERTINENT STATUTES AND REGULATIONS.

Section 5 of the World War Veterans' Act of 1924, as amended July 3, 1930, c. 849, sec. 1, 46 Stat. 991 (U. S. C., Title 38, Sec. 426), is in part as follows:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, * * *.

Pursuant to the authority contained in Section 13 of the War Risk Insurance Act, 40 Stat. 399, there was promulgated on March 9, 1918, Treasury Decision No. 20, reading in part as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *.

ARGUMENT.

I.

THERE WAS NO SUBSTANTIAL EVIDENCE OF TOTAL PERMANENT DISABILITY ON JANUARY 29, 1919.

The test of total disability under a war risk insurance contract is whether an insured suffers from some impairment of health, mental or physical, which ren-

ders it impossible for him to pursue any substantially gainful occupation with reasonable regularity and without serious injury to health. The burden of proving that such a disability has developed during the life of the insurance contract and is reasonably certain to continue throughout the insured's lifetime is upon the person suing. *Lumbra v. United States,* 290 U.S. 551; *United States v. Spaulding,* 293 U.S. 498, rehearing denied, 294 U.S. 731. When the evidence shows that the insured has been gainfully employed for substantial periods after the date of his alleged total and permanent disability without injury to his health, the burden of proof is not carried and the plaintiff is not entitled to a recovery, for it is well settled that a substantial work record refutes the claim. *Lumbra v. United States,* supra; *United States v. Spaulding,* supra; *Deadrich v. United States,* 74 F. (2d) 619 C.C.A. 9th); *United States v. Alvord,* 66 F. (2d) 455 (C.C.A. 1st), certiorari denied, 291 U.S. 661; *Grant v. United States,* 74 Fed. (2d) 302 (C.C.A. 5th), certiorari denied, 295 U.S. 735; *United States v. Gwin,* 68 F. (2d) 124 (C. C. A. 6th); *United States v. Brown,* 76 F. (2d) 352 (C.C.A. 1st).

A review of the evidence relied upon by the plaintiff to prove her claim that the insured was totally and permanently disabled on January 29, 1919, discloses that, although there was evidence to show that he was changed in appearance and conduct after his return home from the military service in January of 1919, he was gainfully employed most of the time thereafter until at least April, 1922, including employment by the Southern Pacific Railroad, during which

his earnings were $2395.18. In November, 1927, he entered a Government hospital, afflicted with dementia praecox, and he has been hospitalized most of the time since then. A summary of the evidence follows:

SUMMARY OF THE EVIDENCE.

Before he entered the military service insured worked as a clerk in an insurance broker's office at a monthly salary of $85 (R.18). According to the testimony of his working associates and friends he was a happy, energetic, normal individual in his work and ways (R. 14, 17-18).

During military service he contracted influenza either in September or October, 1918, spending a month in the hospital (R. 22-23). Upon return to duty he seemed to be in poor health, lacked pep and complained of severe headaches and pains in the back of his head, according to the testimony of a comrade (R. 22-23). For a time he was given light assignments.

Just prior to discharge in January, 1919, while stationed at Presidio, he visited his home in San Francisco and on this occasion his mother observed that he had "no expression at all". He looked so different that she inquired what was the matter with him and his response was that he had left some men on Market Street and had to hurry. He stayed home about five or ten minutes (R. 27).

At discharge he signed a statement to the effect that he was not suffering from any impairment of mind

or body. The surgeon who examined him at that time certified that he was free from disability and his commanding officer signed a statement to the same effect (R. 90; Defendant's Exhibit No. 1).

After discharge he returned home and lived with his mother most of the time thereafter until he entered the hospital at Palo Alto in 1927 (R. 27-28). His mother testified that he suffered from severe headaches for three or four or maybe more years (R. 27-28). She observed a fixed stare on his face and a change in his conduct manifested by nervousness and a disinclination to see any of his friends (R. 27-28). She thought his condition had remained the same ever since and she did not consider him crazy (R. 28). A friend and prewar business associate testified that he met the insured in July or August of 1919 and observed that he "seemed different". Again he had occasion to observe the insured in the year 1923 while the latter was working in a garage, and that at that time he concluded that the insured "acted irrational" (R. 15). He could not say whether insured was rational or irrational from 1919 to 1923 (R. 16). The manager of the insurance brokerage office stated that the insured appeared changed when first seen after his return from military service, and that when he was offered his old job back he seemed indifferent (R. 17), so much so that the manager inquired of one of insured's former associates if he knew what was the matter (R. 18). Arthur Hammer, a friend and business partner, stated that when he first saw the insured in September, 1919, he "seemed kind of distant,

didn't seem to have the same manner about him. He seemed to have a faraway look, seemed to be looking into blank space" (R. 20).

Lucia Martin, a friend and associate in the insurance brokerage office, stated that when she first saw the insured in the early spring of 1919 she thought that he was irrational (R. 34-35). She formed the opinion that he was insane because he was not friendly, pleasant or courteous and had a fixed stare on his face, in contrast to his conduct and appearance before service (R. 37).

In the year 1919 he worked at several occupations for various periods. The exact time that he worked in 1919 was not shown, but it appeared from a statement which he had made in an application for employment with the Southern Pacific Railroad Company that he was engaged as a clerk with the United States Housing Corporation, Vallejo, California, from April 1, 1919, to June 1, 1919, and as a mechanic in the Merchants Garage, San Francisco from September 1, 1919, to April 1, 1920 (R. 106). In a second application presented to the same company he represented that he had worked as a stenographer with the United States Housing Corporation at Vallejo, California, from February, 1919, to May, 1919, and as a stenographer and bookkeeper with the Sierra Auto Company, Reno, Nevada, from May, 1919, to December, 1919 (R. 107).

Mrs. Eide, insured's mother, testified that after he came out of the army he first went to work in the

Merchants Garage, remaining there for one week when he was fired because of headaches (R. 30-31). She stated that he did no work after this for a whole year, and then was next employed at the Terminal Garage for a three months' period in 1920 (R. 30). However, when asked if he had not worked at Vallejo in 1919 she admitted that he had worked at that place for about four or five weeks possibly in 1919. She also knew of his employment with the Sierra Auto Company in Reno, even though she did not remember the month or the year that he was so employed. She did not think he had worked as long as from May, 1919, until July, 1919 (R. 30). She did not know how many jobs he had held from the time he came back from the service until he entered the hospital in 1927 (R. 28).

In 1920 he worked in a garage for several months (R. 30-31, 106-107), played Sunday baseball for pay (R. 30, 106), and also was employed by the Southern Pacific Railroad Company (R. 93-94). From his mother's testimony it appears that he worked in a garage for about three months and then quit because of severe headaches (R. 28-29). From the insured's own statement in the first application presented to the Southern Pacific, it appears that he was employed in the Merchants Garage, San Francisco, from September 1, 1919, to April 1, 1920 (R. 106). However, in his second application he represented that he had been employed in a garage from January, 1920, to June, 1920 (R. 107).

Henry Bogel, a car washer employed by Levinson Bros., testified that the insured had worked for that company for six months in 1920 as a floorman selling gasoline and oil, working from 8 in the morning until 6 at night. He did not observe anything wrong with him during this six months' period (R. 91).

In the summer of 1920 he played Sunday baseball and engaged in practice sessions two or three nights a week (R. 98-99). For this he received $10 or $15 per game (R. 98-99). From the testimony of Wells, a pitcher on the same baseball team (R. 98-99), and others (R. 95-96) he was a good ball player and appeared to be happy while so engaged. Wells considered him one of the smartest catchers he had ever pitched to and roomed with him for two months or longer (R. 98-99).

In June, 1920, he went to work for the Southern Pacific Railroad Company and was employed by that company for a substantial period thereafter until April, 1922. The dates of his employment and the wages paid were as follows (R. 93-94):

		Monthly	Annually
Second half of June, 1920		$62.30	
First half of July	$ 2.69		
Second half of July	34.90		
		37.59	
First half of August	81.84		
Second half of August	14.73		
		96.57	
First half of September	140.84		
Second half of September	149.83		
		290.67	
First half of October	172.34		
Second half of October	139.64		
		311.98	
First half of November	67.59		
Second half of November	181.84		
		249.43	
First half of December	83.64		
Second half of December	130.52		
		214.16	
			$1,262.70
First half of January, 1921	76.24		
Second half of January	25.85		
		102.09	
Second half of May	24.03		
		24.03	
First half of June	147.48		
Second half of June	121.50		
		268.98	

	Monthly	Annually
First half of July	24.78	
Second half of July	28.07	
		52.85
First half of August	117.20	
Second half of August	64.16	
		181.36
First half of September	59.56	
Second half of September	51.99	
		111.55
First half of October	36.00	
		36.00
		776.86
First half of January, 1922	46.80	
Second half of January	65.52	
		112.32
First half of February	60.84	
Second half of February	46.80	
		107.64
First half of March	60.84	
Second half of March	65.52	
		126.36
First half of April	9.30	
		9.30
		$355.62

Silva, the timekeeper for the company, testified that the men worked according to seniority and that the records in his possession showed that the insured had been cut off from the working list at certain times

because there was not enough work. If he had been dropped from the rolls because of illness it would have been shown (R. 94).

At first he worked as a machinist's helper in the shop and later as a fireman on the road (R. 99-105). Greenman, a timekeeper (R. 95), and Horner, a civil engineer (R. 97-98), both employed by the Southern Pacific during this same period, testified that they had occasion to observe the insured in the shop and also playing baseball, and that they never noticed anything unusual or out of the ordinary about his physical or mental condition.

In the course of his employment with the railroad company, he was twice examined and was given a first class rating on each occasion. Dr. Cornish first examined him in November, 1920, and stated that he did not find anything unusual in his physical or mental make-up (R. 100). He did not observe a fixed stare or fixed expression on insured's face (R. 101). Dr. Mangan conducted the second examination on January 9, 1922, and at that time did not observe anything abnormal about insured's physical or mental condition. He stated that if there had been any abnormality he believed he would have noted it (R. 103), although he admitted that insured might have been afflicted with a mental disability at the time (R. 104).

In 1922 or 1923 he operated a garage in partnership with Arthur F. Hammer for a period of about six months (R. 18, 19, 21, 32). About two months after entering into this partnership, Hammer noticed that

insured was losing interest in his work and in the business (R. 21). He concluded that the insured was crazy (R. 18) and decided to dissolve the partnership because they were losing money (R. 19). He observed that at times insured would be standing at the gasoline pump staring into space for half an hour at a time (R. 19). In later years, while operating a restaurant, he had occasion to observe the insured on visits to the restaurant, and noticed that he continued to stare and act strangely (R. 20-21). Although the partnership earnings were not revealed, Mrs. Eide testified that while insured was engaged in this undertaking he was paying her $60 monthly (R. 32-33).

In October, 1927, he entered the Veterans' Hospital at Palo Alto, California (R. 28-29). Mrs. Eide stated that at the time he was so nervous he could not hold a book in his hand (R. 29). An examination made at the time of admission on October 30, 1927, resulted in a diagnosis of dementia praecox, catatonic type (Ex. 5-A). An examination made February 20, 1928, for the purpose of determining whether the insured might be furloughed resulted in the same diagnosis (Ex. 5-B), as did an examination made by a board of three on June 11, 1930, and another one made July 19, 1931 (Ex. 5-E).

Dr. R. L. Richards examined the insured May 16, 1929, finding him definitely mentally sick and diagnosed his condition as dementia praecox (R. 41). From the history obtained, the doctor was of the impression that the insured had suffered an acute infectious attack in 1918, which was probably encepha-

litis lethargica (R. 42). In answer to a question containing the definition of total permanent disability as set forth in the contract, he expressed the opinion that insured was totally and permanently disabled at the time of his examination in 1929 (R. 42-43).

Dr. Fred J. Conzelmann stated that he was the insured's ward surgeon at the Stockton State Hospital; that insured was admitted to that hospital on June 4, 1932, and had been there since with the exception of a period extending from September 29, 1932 to January 9, 1933. His diagnosis was dementia praecox, paranoid type (R. 48). In answer to a question containing the definition of total permanent disability he expressed the opinion that insured was totally and permanently disabled at that time and that he did not think there was any probability of a cure (R. 52). He next interpreted the findings contained in the several examination reports that were made at the Veterans Hospital, Palo Alto, California (R. 53-63). In answer to a hypothetical question in which he was asked to consider the evidence in the case, he expressed the opinion that the insured was totally and permanently disabled in the spring of 1919 and prior to the lapse of the policy on July 1, 1919 (R. 63-64). He expressed the opinion that insured was totally and permanently disabled when the disease began, and he thought that it had its inception with the attack of influenza in service (R. 65). The following question was then propounded (R. 66):

> "THE COURT: It is your conclusion that as soon as the symptoms of what you consider de-

> mentia praecox appear that a person is totally and permanently disabled no matter if they actually are engaged in a vocation?
>
> A. Yes."

Dr. Edwin M. Wilder expressed the opinion, based upon all of the testimony in the case, that the insured suffered from dementia praecox, paranoid type (R. 78). He thought the disease had its inception in the fall of 1918 or the spring of 1919, and was then in its incipient stage (R. 79). When asked by the court as to whether he thought the evidence showed dementia praecox prior to discharge, he answered (R. 79-80):

> I am not prepared to say as to that. He had shown the presence, through the sergeant's testimony, of a very severe infection, practically putting him out of business, but I don't think we have any, as I recall it, I don't recall—it was only an affidavit and read and I didn't get it as well as I did from the men testifying directly. Mr. Romaine's testimony as to his character when he came back to the office immediately after his discharge is the point that I definitely recognize a change of personality.

He thought that when Mrs. Martin first saw the insured in February or March of 1919, that he was then suffering from some type of dementia (R. 80). In answer to a question containing the definition of total permanent disability (R. 81), he expressed the opinion that the insured was totally and permanently disabled prior to July 1, 1918 (R. 82). He stated that physical exercise was not dangerous and that it was a necessary part of the treatment of dementia prae-

cox (R. 87). The shocks resulting from contact with the world were damaging and he thought that train work would hasten dementia praecox (R. 88). He considered baseball a good thing, much better than work in a garage (R. 88). On redirect examination he stated that he did not have any doubt but that insured had dementia praecox and was permanently and totally disabled in the spring of 1919 prior to July.

Dr. Elmer L. Crouch, a Government witness, stated that he examined the insured in November, 1927, at the Veterans Hospital at Palo Alto (R. 108). After detailing the history which was furnished him at the time of his examination and reciting the findings which he made (R. 109-117), he stated that they suggested a diagnosis of dementia praecox catatonic type (R. 117). In answer to a hypothetical question in which he was asked to consider the evidence in the case, he expressed the opinion that the insured was able to follow a gainful occupation in March, 1919, and that total permanent disability had its onset in 1922 or 1923 (R. 119).

Dr. Richard T. O'Neill testified that he examined the insured on June 11, 1930 (R. 129), making a diagnosis of dementia praecox (R. 130). He thought the insured was a constitutional psychopathic inferior, a potential praecox all his life, and that the psychosis probably became pronounced in 1922 or 1923 (R. 131). He thought that an occupation would be the best therapeutic that one could have (R. 132). When asked about a statement appearing in the ex-

amination report which he had signed, in which the beginning date of the incompetency was given as 1919 with a question mark thereafter (R. 133-134), he stated that this meant that it was questionable from the information at hand whether the incompetency had its inception in 1919 (R. 134).

Mrs. Eide, on rebuttal, testified that when insured worked for the Southern Pacific Company at Dunsmuir and came home for visits, he was very nervous and had headaches (R. 134). She also recalled that while he worked at the Merchants Garage he received $50 a month for a period of about three months for work as a night watchman or washing cars (R. 134).

ANALYSIS OF THE EVIDENCE.

The evidence affirmatively established insured's employment for substantial periods after the date of his alleged total and permanent disability on January 29, 1919. From February, 1919, to June, 1920, he held various positions. While the exact periods of his various employments and the wages received were not definitely shown because the evidence was somewhat conflicting and incomplete, it appears from his own statements and the testimony of others that he worked during the major portion of the time elapsing between February, 1919, and June, 1920.

In June, 1920, he commenced work with the Southern Pacific Railroad Company, and continued with some interruptions until April, 1922. The company

records were produced covering the period of employment and they established beyond dispute that for the twenty-two months' period he received wages aggregating $2395.18, or a monthly average of over $100.00, notwithstanding several periods of enforced idleness due to lack of work, amounting in all to some seven months (R. 94). So that, eliminating time lost due to economic factors and computing on the basis of months actually worked, the monthly average would be in excess of $150.00. Using either figure the monthly earnings represented a substantial increase over his prewar monthly wage of $85.00. He also received $10.00 or $15.00 per game for playing Sunday baseball. Employment such as this has been repeatedly held sufficient to refute the claim and to bar recovery on a war risk contract. *Lumbra v. United States,* supra; *United States v. Spaulding,* supra; *Deadrich v. United States,* supra; *United States v. Alvord,* supra; *Grant v. United States,* supra; *United States v. Deal,* 82 F. (2d) 929 (C.C.A. 9th). The principle upon which these cases rests is aply stated in *Alvord v. United States* in the following language:

> To say that a person, who could do, and did do, the amount of work which the plaintiff performed following his discharge from the army, was during that period "totally and permanently disabled", is to say something which is obviously not so, if the words be given their usual meaning. They are powerful words carrying a high content of meaning which perhaps has not always been fully recognized in cases of this character.

Although the authorities also recognize the fact that work performed at a risk to the insured's health or life will not bar a recovery, this case does not fall within that category, for the evidence did not establish that insured's employment with the Southern Pacific was injurious to his health. On the contrary, the evidence pretty definitely established that he possessed the physical and mental capacity to do the work and that he rendered satisfactory services while so engaged. Two examinations by company physicians resulted in his being accorded a first class rating and failed to reveal any physical or mental abnormalities (R. 100-104). Working associates attested his normal conduct while working and playing baseball (R. 95-99). One of these was the pitcher on the same baseball team, the insured being the catcher, and he thought the insured was one of the smartest catchers he ever pitched to. His opportunities to observe were of the best for he also roomed with the insured for two months or more.

In fact there was no showing that the insured suffered from dementia praecox or any disability while working for the Southern Pacific unless the opinion testimony of plaintiff's medical witnesses be accepted as sufficient for that purpose. None of the medical witnesses had examined him in 1920, 1921 or 1922 while he was on the rolls of the company or for many years thereafter. Dr. Richards first examined him May 16, 1929, Dr. Conzelmann first examined him June 4, 1932, seven and ten years respectively after the employment terminated. Dr. Wilder never examined him.

However, both Doctors Conzelmann and Wilder expressed the opinion that he had been totally and permanently disabled and suffering from dementia praecox prior to the lapse of his insurance contract on July 1, 1919, attributing the disease to the influenza attack suffered in service. Their opinions that he was totally and permanently disabled were without weight because they were on the ultimate issue and were not within their province as medical experts. *United States v. Spaulding,* supra, *United States v. Stephens,* 73 F. (2d) 695 (C.C.A. 9) and *Hamilton v. United States,* 73 F. (2d) 357 (C.C.A. 5). Furthermore, they were very plainly contrary to the physical facts and lacked probative force. *United States v. Spaulding,* supra; *Deadrich v. United States,* supra, and *O'Quinn v. United States,* 70 F. (2d) 599 (C.C.A. 5).

Their opinions that he had dementia praecox during service would likewise seem to be without probative value because contradicted by the fact that insured was found physically and mentally sound when examined before discharge and when examined while working for the Southern Pacific Railroad Company. In *United States v. Spaulding,* supra, the Supreme Court said:

> As against the facts directly and conclusively established this opinion evidence furnishes no basis for opposing inferences.

Opinion testimony of a like character was given in *Grant v. United States,* a case which also involved dementia praecox, and in holding that such testimony was insufficient the court said:

> Undoubtedly he has had the ailment attributed to him since January, 1918, but certainly up to 1930 he cannot be said to have been totally disabled thereby. Doctors who never saw him before 1930 thought he had demenita praecox and that he must have been able to follow continuously a substantially gainful occupation, but this opinion must yield on the latter point to the facts. *Hamilton v. United States,* 74 Fed. (2d)—. They say that while worry is harmful in such cases, work is not, but is calculated to be beneficial. What Grant did makes it clear that at no time before the lapse of his policy could he rightfully have said to the United States: "Pay me. I can no longer make a living. A reasonable verdict could not have been had for the plaintiff."

But even though it be assumed that there was sufficient evidence in this case to support an inference that the insured was suffering from dementia praecox on January 29, 1919, this would not suffice for proof of an incipient dementia praecox within the life of the insurance policy, does not spell total permanent disability when the subsequent conduct of the insured demonstrates that the disease was not totally disabling. *Poole v. United States,* 65 F. (2d) 795 (C.C.A. 4), certiorari denied, 291 U. S. 658, *Grant v. United States, supra, United States v. Gwin,* 68 F. (2d) 124 (C. C. A. 6) and *United States v. Cochran,* 63 F. (2d) 61 (C.C.A. 10). There was evidence to show dementia praecox during the life of the insurance contract in all of these cases, but the disease did not prevent the pursuit of an occupation after the contract had lapsed and thus was not considered totally dis-

abling. Grant was discharged from the military service on a Surgeon's Certificate of Disability because of dementia praecox.

Ordinarily work is helpful rather than harmful to a person afflicted with incipient dementia praecox. It was so in *Grant v. United States,* supra and *Poole v. United States, supra.* Its therapeutic value is recognized by the medical profession, occupational therapy being one of the standard forms of treatment prescribed in mental cases. While Dr. Wilder did not think that train work would prove beneficial because of the responsibility involved in performing certain of the tasks incidental thereto, such as timing the throwing of a flying switch, he did think that baseball was a good thing and that physical exercise was a necessary part of the treatment of the praecox. Whether the work performed by the insured while employed by the Southern Pacific Railway Company involved the throwing of switches or not, the fact remains that he did the work assigned him in a satisfactory manner, fully demonstrating his capacity to engage in other kinds of physical labor not involving the slightest element of worry or responsibility. Of course if he could pursue any occupation without injury to health he was not totally permanently disabled. *Gregory v. United States,* 62 F. (2d) 345 (C.C.A. 4th), *United States v. Cornell,* 63 F. (2d) 180 (C.C.A. 8).

The testimony of the lay witnesses that he was changed in conduct and appearance after his return from military service was inadequate because of the

established fact that whatever his mental condition it did not prevent him from working and was therefore not total. Furthermore, it is recognized that mental diseases are as varied in intensity and shades of difference as is human character so that symptoms which the lay witnesses described might well have denoted a temporary partial or permanent partial disability, neither of which was covered by the contract. *United States v. Kiles,* 70 F. (2d) 880 (C.C.A. 8), *United States v. Brown,* 76 F. (2d) 352 (C.C.A. 1).

Another significant fact inconsistent with the claim of total permanent disability in January, 1919, is that insured's condition evidently did not require medical treatment or institutional care until the year 1927, for it was not sought until then. This was more than eight years after insurance protection expired.

THE OPINION TESTIMONY GIVEN BY PLAINTIFF'S MEDICAL WITNESSES ON THE ULTIMATE ISSUE OF TOTAL PERMANENT DISABILITY WAS IMPROPERLY RECEIVED.

All of plaintiff's medical witnesses were given the definition of total permanent disability embodied in the war risk contract and were permitted to express an opinion as to whether they considered the insured totally and permanently disabled. Dr. Richards expressed the opinion that the insured was totally and permanently disabled on the date of his examination May 16, 1929 (R. 43). Dr. Conzelmann thought he was totally and permanently disabled at

the time of the trial (R. 52) and that the disability had existed in the same degree since the attack of influenza suffered during military service (R. 63, 64, 65). Dr. Wilder likewise expressed the opinion that the insured was totally and permanently disabled prior to July 1, 1919 (R. 81-82, 89). This opinion testimony was improperly received for it is now thoroughly well settled that the ultimate issue of total permanent disability in a war risk insurance suit is not one to be resolved by the opinions of medical experts and that such testimony invades the province of the jury. *United States v. Spaulding, supra, United States v. Stephens, supra, United States v. White,* 77 F. (2d) 757 (C.C.A. 9), *United States v. Harris,* 79 F. (2d) 341 (C.C.A. 9), *United States v. Hibbard,* 83 F. (2d) 785 (C.C.A. 9), *United States v. Frost,* 82 F. (2d) 152 (C.C.A. 9), *United States v. Provost,* 75 F. (2d) 190 (C.C.A. 5) and *Hamilton v. United States, supra.*

Although an objection was not interposed to the introduction of this testimony and it was not assigned as error when the present appeal was perfected, it is now urged as an additional ground for reversal under the authority of *United States v. White,* supra, wherein this court held that the admission in evidence of similar testimony was plain error warranting reversal notwithstanding the failure of Government counsel to interpose an objection, note an exception or to properly present the question on appeal by an assignment of error. It will be observed that the present case was tried before the above quoted cases were decided.

CONCLUSION.

As there was no substantial evidence to support the judgment and it was error to admit the opinion testimony on the ultimate issue, it is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
September 14, 1936.

Respectfully submitted,

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